UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHINESE AUTOMOBILE DISTRIBUTORS OF AMERICA, LLC, a limited liability company, individually and, with respect to certain claims, in a derivative capacity,	:	ELECTRONICALLY FILED
Plaintiff,	:	
v.	:	07 Civ. 4113 (LLS)
MALCOLM BRICKLIN, an individual; JONATHAN BRICKLIN, an individual; BARBARA BRICKLIN JONAS, an individual MICHAEL JONAS, an individual; SCOTT GILDEA, an individual; and VISIONARY VEHICLES, LLC, a limited liability company,	:	
Defendants.	:	

REPLY MEMORANDUM OF DEFENDANT SCOTT GILDEA
IN FURTHER SUPPORT OF MOTION TO DISMISS

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Of Counsel:

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Defendant Scott Gildea respectfully submits this memorandum of law in further support of his motion for an Order (1) dismissing the Complaint of plaintiff Chinese Automobile Distributors of America, LLC ("CADA" or "plaintiff")(the "Complaint"), for (a) lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and 28 U.S.C. § 1367, and (b) failure to state a claim upon which relief can be granted and to plead such a claim with adequate specificity, pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 9(b); and (2) granting such other relief as the Court may deem just and proper.[1]

INTRODUCTION

Plaintiff's opposition to Mr. Gildea's motion to dismiss presents no persuasive reason why, if the Court denies the other defendants' motion to dismiss the sole Federal claim asserted in the complaint against two of them, it should exercise supplemental jurisdiction over the three substantially different state claims against Mr. Gildea. The Court should not exercise such jurisdiction since litigation of those claims would significantly - and unnecessarily - expand the case before it.

Nor can plaintiff's opposition obscure the substantive defects in the claims against Mr. Gildea. Plaintiff attempts to cast Mr. Gildea as an "active participant" in defendant Malcolm Bricklin's alleged "scheme" to defraud plaintiff, and suggests that Mr. Gildea, as Visionary Vehicle ("VV")'s corporate accountant (not outside auditor), engaged in "questionable accounting practices" and permitted VV to be "looted." See Doc. No. 24, Plaintiff's Memorandum of Law in Opposition to Defendant Gildea's Motion to Dismiss ("Plaintiff's Mem.") at 1. Nevertheless, plaintiff has failed to identify with requisite particularity any underlying fraud alleged to have been committed by Mr. Bricklin or VV, and/or otherwise allege with requisite particularity any wrongdoing by Mr. Gildea.

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[1] Mr. Gildea incorporates by reference the arguments made by the Bricklin Defendants in support of their motion to dismiss.

ARGUMENT

POINT I

THE CLAIMS AGAINST MR. GILDEA SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Plaintiff concedes that it has not alleged any federal claims against Mr. Gildea and its sole federal claim, Count Three of the Complaint, alleges a federal securities law violation against only two of the other five defendants, namely, Mr. Bricklin and VV. Instead, plaintiff now contends that the Court has supplemental jurisdiction over its claims against Mr. Gildea under 28 U.S.C. § 1367 (which is not referenced in the Complaint) because the "federal and state issues are substantially intertwined." Plaintiff's Mem. at 4. This contention fails upon examination of plaintiff's claims and the very case law upon which it purports to rely.

Beyond dispute, this Court may decline to exercise supplemental jurisdiction over plaintiff's state law claims where, among other circumstances, state law claims "substantially predominate" over plaintiff's sole federal claim. See Plaintiff's Mem. at 4-5. The case SST Global Technology, LLC v. Chapman, 270 F. Supp. 2d 444 (S.D.N.Y. 2003), upon which plaintiff relies, see Plaintiff's Mem. at 5-7, supports dismissal here. Although plaintiff contends that SST Global is "factually analogous" to the present case, id., plaintiff there alleged that each defendant violated the Securities and Exchange Act of 1934, as a result of which the Court had original jurisdiction over each defendant. By contrast, here, plaintiff asserts its federal securities law claim against only two of the defendants, Mr. Bricklin and VV.

Equally critical, in determining whether to exercise supplemental jurisdiction over the plaintiff's state law claims, the SST Global court cited Freer v. Mayer, 796 F. Supp. 89, 94 (S.D.N.Y. 1992), for the proposition that corporate waste and breach of fiduciary duty claims are "fundamental issues of state law." Notably, the plaintiff here, but not in SST, asserts corporate waste claims.

The SST Global court also relied upon Nelson v. Stahl, 173 F. Supp. 2d 153 (S.D.N.Y. 2001), where the court retained supplemental jurisdiction over certain state law claims, but declined to exercise supplemental jurisdiction over other state law claims, despite having sustained federal claims against all the defendants. In so doing, the Nelson court reasoned that the dismissed state law claims did not arise from the same "nucleus of operative facts" as the surviving federal securities claims. Rather, they involved issues of fact and law "far more wide-ranging" than the federal claims; concerned a larger group of persons than those implicated by the federal claims; and the proof required to decide the state law claims would be "much different from, and to a significant extent broader than, that required for resolution of the federal claims." Id., 173 F. Supp. 2d at 170 (citation omitted); see SST Global, 173 F. Supp. 2d at 457.

Similarly, here, plaintiff's state law claims of corporate waste, misappropriation of corporate assets, and breach of fiduciary duty are not only "fundamental issues of state law," see Freer, 796 F. Supp. at 94, but will require vastly more judicial resources to adjudicate, and private resources to litigate, than the sole federal securities law claim. See Diven v. Amalgamated Transit Union Int'l & Local 689, 38 F.3d 598, 601 (D.C. Cir. 1994) (noting that the expenditure of more judicial resources to adjudicate state law claims over federal claims is a factor that courts should consider); Nelson, 173 F. Supp. 2d at 170. As in Nelson, the issues involved in plaintiff's state law claims, particularly corporate waste, misappropriation, and breach of fiduciary duty, are "far more wide-ranging" than plaintiff's federal claim and concern many more defendants than the two defendants implicated by the federal claim.

Furthermore, the proof required to adjudicate the state law claims would be entirely different from, and broader than, that required to resolve the federal claim. Plaintiff does not allege that Mr. Gildea's conduct related to the alleged misrepresentations upon which the only federal claim against Mr. Bricklin and VV is based. Mr. Gildea is not alleged to have made any misrepresentation to plaintiff or to have concealed anything from Mr. Bricklin.

Plaintiff mistakenly contends that "to decline jurisdiction would require the parties to segregate and litigate the same issues in different courts . . . subjecting the litigants to the possibility of contradictory findings." Plaintiff's Mem. at 7 (emphasis added). To the contrary, if the Court were to exercise supplemental jurisdiction over plaintiff's state law claims, it would unfairly require Mr. Gildea to participate in a federal lawsuit in which he is not alleged to have violated any federal law. This is in stark contrast to SST Global, where the court had original jurisdiction over all defendants. See SST Global, 270 F. Supp. 2d at 455-456.

Moreover, the interests of judicial economy will be thwarted if the more fact-intensive state law claims, particularly corporate waste and misappropriation of corporate assets, are heard by the

Court. Nor is there any risk of "contradictory findings" by a state court because liability for the state and federal law claims will require separate factual and legal inquiries.

Accordingly, whether or not the Court accepts the persuasive arguments of Mr. Bricklin and VV that the federal claim against them should be dismissed, it should decline to exercise jurisdiction over plaintiff's state law claims against Mr. Gildea and dismiss such claims without prejudice.

POINT II

SHOULD THE COURT EXERCISE JURISDICTION OVER MR. GILDEA, IT SHOULD DISMISS THE COUNTS ASSERTED AGAINST HIM.

A. Plaintiff has Failed to Plead its Claim for Aiding and Abetting Fraud with Requisite Particularity.

Plaintiff has failed to plead with requisite particularity a cause of action against Mr. Gildea for aiding and abetting fraud under New York law. As plaintiff concedes, to establish liability for aiding and abetting fraud under New York law, a plaintiff must show: (1) that a fraud existed; (2) that the defendant had actual knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission. Lerner v. Fleet Bank, N.A., 459 F.3d 273, 292 (2d Cir. 2006); Franco v. English, 210 A.D.2d 630, 633, 620 N.Y.S.2d 156, 159 (3d Dep't 1994); Plaintiff's Mem. at 8; Gildea Mem. at 12. The Complaint plainly fails to satisfy the foregoing elements with respect to Mr. Gildea.

In support of its contention that it has adequately pled a cause of action for aiding and abetting fraud, plaintiff asserts, inter alia, that Mr. Gildea knew or should have known, and substantially assisted in the commission, of the alleged frauds because of his claimed role as VV's corporate accountant. Plaintiff does not, however, allege that Mr. Gildea knew that Mr. Bricklin would make the alleged misrepresentations that form the basis of plaintiff's underlying fraud theory. Nor does the Complaint allege that Mr. Gildea learned of the purported misrepresentations after they were allegedly communicated to plaintiff. To the extent the Complaint simply implies that Mr. Gildea should have known of Mr. Bricklin's and VV's alleged frauds, that fails to satisfy the "actual knowledge" or pleading requirements under Fed. R. Civ. P. 9(b). See, e.g., Ryan v. Hunton & Williams, No. 99 Civ. 5938, 2000 U.S. Dist. LEXIS 13750, at *26 (E.D.N.Y. Sept. 20, 2000).

Plaintiff cannot overcome the fact that its allegations of wrongdoing against Mr. Gildea are based entirely upon "information and belief," which is, as a matter of law, insufficient to state a claim of aiding and abetting fraud. See Toussaint v. JJ Weiser & Co., No. 04 Civ. 2592, 2005 U.S. Dist. LEXIS 2133, at *32 (S.D.N.Y. Feb. 9, 2005); Vtech Holdings Ltd. v. Pricewaterhouse Coopers LLP, 348 F. Supp. 2d 255, 269 (S.D.N.Y. 2004). Plaintiff is forced to argue, lamely, that Mr. Gildea's "actual knowledge of corporate malfeasance is not contradicted by the pleadings and the accounting irregularities set forth in the Complaint are not alleged upon information and belief." Plaintiff's Mem. at 9 (emphasis added). Surely, this does not satisfy the "actual knowledge" requirement or otherwise state a prima facie case of aiding and abetting fraud. For purposes of Fed. R. Civ. P. 9(b), where actual knowledge of fraud is not alleged, it cannot matter whether or not such knowledge is contradicted by the pleadings.

Nor has plaintiff sufficiently alleged that Mr. Gildea provided substantial assistance to advance the commission of the alleged fraud. Specifically, plaintiff asserts that because Mr. Gildea, "in his capacity as VV's corporate accountant, increased VV's expenses by $800,000 without sufficient explanation or documentation, . . . Gildea is sufficiently tied to the fraudulent acts . . . ." Plaintiff's Mem. at 9. Alleging that Mr. Gildea increased VV's expenses without sufficient documentation, fails to allege sufficiently that Mr. Gildea was an active participant in, let alone knew of, the claimed frauds. It would violate the letter, spirit, and purpose of Fed. R. Civ. P. 9(b) to hold that plaintiff's mere suggestion that Mr. Gildea increased VV's expenses to advance the alleged frauds is sufficient to state a prima facie case of aiding and abetting fraud. See Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080, 1088 (S.D.N.Y. 1977)(stating that "the protection of Rule 9(b) is particularly important where the defendants are accountants . . . . whose reputations in their field of expertise are most sensitive to scandal."); see also Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 116 (2d Cir. 1982)("Rule 9(b) [fails] in its purpose if conclusory generalizations . . . permit a plaintiff to set off on a long and expensive discovery process in the hope of uncovering some sort of wrongdoing . . . .").[2]

Accordingly, in the absence of specific allegations, plaintiff's claim against Mr. Gildea for aiding and abetting fraud must be dismissed.

B. Plaintiff has Failed to Allege Sufficiently Causes of Action for Misappropriation of Corporate Funds and Corporate Waste.

Plaintiff claims that "Defendant Bricklin and the other Defendants" have engaged in misappropriation of corporate assets and corporate waste, see Compl. ¶ 26, but the Complaint is devoid of any specific factual allegation that Mr. Gildea engaged in any such conduct or had the authority to do so. The Complaint merely

[2] Plaintiff does not allege that Mr. Gildea audited VV or that Mr. Gildea made any representations to or otherwise communicated with plaintiff. See generally Calcutti v. SBU, Inc. 273 F. Supp. 2d 488 (S.D.N.Y. 2003) ("It is well settled that without an independent duty to disclose, mere inaction [of an accounting firm] does not amount to substantial assistance for purposes of determining aider and abettor liability."); Morin v. Trubin, 711 F.Supp. 97, 113 (S.D.N.Y. 1989)("neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose."); National Westminister Bank USA v. Weksel, 124 A.D.2d 144, 511 N.Y.S.2d, 626, 629 (1st Dep't 1987) ("we know of no case where mere inaction by a defendant has been held sufficient to support aider and abettor liability for fraud").

lumps Mr. Gildea together with the other defendants and fails to specify what, if anything, Mr. Gildea did to waste, misappropriate, or otherwise divert VV's corporate assets for some improper or unnecessary purpose.

Accordingly, plaintiff's claims of misappropriation and waste against Mr. Gildea should be dismissed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Gildea's opening brief in support of his motion to dismiss, plaintiff's claims against Mr. Gildea should be dismissed and Mr. Gildea should be granted such other relief as the Court may deem just and proper.

Dated: New York, New York
November 29, 2007

Respectfully submitted,

LANDMAN CORSI BALLAINE & FORD P.C.

By: [signature]

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CERTIFICATE OF SERVICE

I, Ameet Kabrawala, certify that on the 29th day of November, 2007, I made service of the Notice of Motion, Declaration of Stephen Jacobs and Memorandum of Law on behalf of Scott Gildea, in accordance with Local Civil Rule 5.2, by electronically filing them with the Clerk of the United States District Court for the Southern District of New York using the CM/ECF system and thereby causing copies thereof to be electronically delivered to the counsel of record.

Ameet Kabrawala (AK 2976)